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Atta Properties Sdn Bhd v Chan Kok Leong & Anor

B HIGH COURT (PENANG) — ORIGINATING SUMMONS NO PA-24NCVC-759–09 OF 2019
WONG HOK CHONG JC
8 SEPTEMBER 2020

C *Civil Procedure — Originating summons — Plaintiff files originating summons to resolve interpretation of contractual clause of share sale agreement — Defendants filed notice of application to convert originating summons as there were material facts in dispute — Whether final balance sum belonged to plaintiff or defendants when condition precedent for release was not fulfilled*

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The plaintiff filed an originating summons to resolve dispute premised purely on the interpretation of a contractual clause. The defendants filed a notice of application to convert the originating summons on the ground that there were material facts in dispute. The defendants as the vendors has entered into a share sale agreement ('the said agreement') with the plaintiff as the purchaser that involved the clearance of squatters occupying the land owned by the subject company. About two months later, a segment in cl 7.4.2 of the said agreement was varied by the parties that the purchaser's solicitors are authorised to administrate the release of the compensation sum directly to the squatters; whereas previously, the purchaser's solicitors would release the compensation sum to the defendants' solicitors who would in turn release it to the squatters. The plaintiff's solicitor letter accepted the change with emphasis that apart from the said variation, the rest of cl 7.4.2, including the condition precedent for the release of the balance sum to the vendor was retained. The dispute was on the final balance sum would go to the plaintiff or the defendants in case of the condition precedent for the release of the same was not fulfilled. The plaintiff's interpretation of the pertinent of cl 7.4.2 was that in the event that the condition precedent for the payment of the balance sum was not fulfilled, the said balance sum was to be refunded by the stakeholders to the plaintiff.

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Held, dismissing the defendants' notice of application:

(1) The overarching obligation to clear or cause the land to be cleared of squatters within the one-year time frame still rested with the defendants. The fact that the plaintiff and the plaintiff's solicitors had a role or undertaken some part of the exercise did not absolve the defendants from the overarching responsibility. In return, they stood to receive a handsome reward of the balance sum of RM930,000. If the condition precedent was not met, the purpose for which the balance sum was held

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by the stakeholders had ended and must be refunded by the plaintiff. It was right to interpret in the manner that the one-year frame was material and not disregarded (see paras 24–25).

[Bahasa Malaysia summary

Plaintif memfailkan saman pemula untuk menyelesaikan pertikaian yang dibuat berdasarkan tafsiran klausa di dalam kontrak. Defendan-defendan mengemukakan notis permohonan untuk menukar saman pemula dengan alasan terdapat fakta material yang dipertikaikan. Defendan-defendan sebagai penjual telah menandatangani perjanjian penjualan saham ('perjanjian tersebut') dengan plaintif sebagai pembeli yang melibatkan pelepasan setinggan di atas tanah yang dimiliki oleh syarikat tersebut. Kira-kira dua bulan kemudian, sebahagian daripada klausa 7.4.2 perjanjian tersebut telah diubah oleh pihak-pihak tersebut menyatakan peguam pembeli diberi kuasa untuk menguruskan pelepasan jumlah pampasan secara langsung kepada penghuni setinggan; sedangkan sebelumnya, peguam pembeli akan menyerahkan jumlah pampasan kepada peguam defendan-defendan yang seterusnya akan melepaskannya kepada penghuni rumah setinggan tersebut. Surat peguam plaintif menerima perubahan dengan penekanan bahawa selain dari variasi tersebut, bahagian klausa 7.4.2 yang lain, termasuk *condition precedent* untuk pelepasan jumlah baki kepada penjual-penjual akan dikekalkan. Pertikaian adalah mengenai jumlah baki akhir yang akan diserahkan kepada plaintif atau defendan-defendan sekiranya *condition precedent* untuk perlepasan jumlah baki tidak dipenuhi. Tafsiran plaintif mengenai klausa 7.4.2 adalah bahawa sekiranya *condition precedent* untuk pembayaran jumlah baki tidak dipenuhi, jumlah baki tersebut akan dikembalikan oleh pihak berkepentingan kepada plaintif.

Diputuskan, menolak notis permohonan defendan-defendan:

(1) Kewajiban utama untuk membersihkan atau menyebabkan tanah dibebaskan dari penghuni setinggan dalam jangka waktu satu tahun adalah tanggungjawab plaintif. Fakta bahawa plaintif dan peguam plaintif mempunyai peranan atau telah melakukan sebahagian daripada perkara itu tidak membebaskan defendan-defendan daripada tanggungjawab yang utama. Sebagai balasannya, mereka menerima ganjaran yang lumayan dari baki berjumlah RM930,000. Sekiranya *condition precedent* tidak dipenuhi, tujuan untuk memegang jumlah baki dipegang oleh pihak berkepentingan telah berakhir dan mesti dikembalikan oleh plaintif. Adalah tepat untuk menafsirkan bahawa jangka masa satu tahun itu penting dan tidak diabaikan (lihat perenggan 24–25).]

Cases referred to

Lee Chin Huat & Anor v Choo Keng Hee & Anor [2013] 3 MLJ 94, CA (refd)
MBF Insurans Sdn Bhd v Lembaga Penyatuan dan Pemulihan Tanah Persekutuan (FELCRA) [2007] 6 CLJ 639, CA (refd)
Mars Equity Sdn Bhd v Tis 'Ata' ashar Sdn Bhd [2006] 4 MLJ 302; [2005] 1 CLJ 513, CA (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (refd)

Legislation referred to

Evidence Act 1950 s 93

(SC Tan) for the plaintiff.
(The Chambers of Yu Shin Ong) for the defendants.

Wong Hok Chong JC:

INTRODUCTION

[1] The plaintiff filed an originating summons to resolve dispute premised purely on the interpretation of a contractual clause, there being no material facts in dispute (encl 1) ('originating summons'). The defendants then filed a notice of application to convert the originating summons into a writ action on the grounds that there were material facts in dispute (encl 5) ('notice of application').

[2] I heard the originating summons and the notice of application concurrently, with the agreement of parties, on the premise that the court would at the end of the hearing decide: (a) whether the matter should be converted into a writ action; and (b) in the event that it were to proceed as an originating summons, to decide on the originating summons itself. I dismissed the notice of application and decided the originating summons in the plaintiff's favour. These are the grounds for my decisions for both applications.

SHARE SALE AGREEMENT

[3] The background facts are as follows. The defendants (vendors) and the plaintiff (purchaser) entered into a share sale agreement dated 11 July 2018 ('agreement') that involved the clearance of squatters occupying the land owned by the subject company.

[4] The material provision in question, cl 7.4.2 of the agreement, provides as follows:

7.4 The purchasers shall pay on or before the completion date by way of banker's

draft I Cashier's Order I Client's Account Cheque the following:

> 7.4.2 The sum of Ringgit Malaysia One Million Five Hundred Thousand (RM1,500,000.00) only to be deposited with the Purchaser's Solicitors on Completion Date being agreed reimbursement of costs expenses for the eviction of all squatters on the Property. The Purchasers Solicitors is hereby authorised by the parties to release to the Vendor's Solicitors (within 7 days of notification) the compensation sum as stipulated in each and every Compensation Agreement (executed subject to a maximum of Ringgit Malaysia (RM50,000.00) only per unit of quarter house or building] and a further sum of Ringgit Malaysia [RM10,000.00] only per unit to the appointed agent for services rendered upon each and every squatter vacating the site. *The balance thereof shall be payable within twelve (12) months from the date of this Agreement only (without further extension) upon proper and complete handover of vacant possession of the property (cleared of all squatters buildings and structures whatsoever) to the Purchasers.* (Emphasis added.)

VARIATION

[5] About two months later, a segment of cl 7.4.2 of the agreement was varied by the parties through an exchange of correspondences. The variation is not in dispute. The defendant's letter of confirmation dated 3 September 2018 set out the changes as follows:

> the sum of Ringgit Malaysia One Million Five Hundred Thousand (RM1,500,000.00) (which has been deposited with the Purchaser's Solicitors) being agreed reimbursement of costs expenses for the eviction of all squatters on the Property *shall be dealt with by the Purchaser* and *shall be paid by the Purchaser's Solicitors directly to the squatters* and the Purchaser's Solicitor shall be authorized the release to to squatters such compensation sum deem sufficient in accordance with the compensation agreement.

[6] The plaintiff's solicitor's letter dated 4 September 2018 accepted the change with emphasis that apart from the said variation, the rest of cl 7.4.2, including the condition precedent for the release of the balance sum to the vendor, is retained:

> ... the balance sum (if any) payable to your client pursuant to cl 7.4.2 of the SSA is only payable strictly within 12 months from the date of the SSA (without further extension) and upon proper and complete handover of vacant possession of the Property (cleared of all supporters building structures whatsoever) to the Purchaser.

[7] In summary, the variation provides that henceforth the purchaser and the purchaser's solicitors are authorised to administrate the release of the compensation sum directly to the squatters; whereas previously, the purchaser's solicitors would release the compensation sum to the vendor's solicitors who would in turn release it to the squatters. Apart from that, cl 7.4.2 remains intact

including the condition precedent for the release of the balance compensation sum.

UNDISPUTED FACTS

[8] The undisputed facts are as follows:

(a) there was no proper and complete hand over of vacant possession of the property (cleared of all squatters, buildings and structures whatsoever) to the purchasers (plaintiff) within 12 months from the date of this agreement (that is by 11 July 2019); and

(b) the final balance sum is RM930,000 and it is held by the purchaser's solicitors as stakeholders.

CRUX OF DISPUTE

[9] The crux of dispute is this: under cl 7.4.2, what happens to the final balance sum where the condition precedent for the release of the same was not fulfilled. Does the said sum go to the plaintiff purchaser or the defendant vendor?

THE PLAINTIFF'S VIEW

[10] The plaintiff's interpretation of the pertinent segment of cl 7.4.2 is as follows: In the event that the condition precedent for the payment of the balance sum is not fulfilled, the said balance sum is to be refunded by the stakeholders to the plaintiff.

RULE OF INTERPRETATION

[11] The plaintiff submits that commercial contracts are interpreted in the following manner:

(a) consonant with business common sense. In *Mars Equity Sdn Bhd v Tis 'Ata' ashar Sdn Bhd* [2006] 4 MLJ 302; [2005] 1 CLJ 513, the Court of Appeal held as follows:

> ... In my judgment, in a purely commercial transaction such as the one we have here, the correct approach is to interpret the agreements in a way that is *consonant with business common sense*. As Lord Diplock said in *Antaios Campania Naviera SA v Salen Rederierna AB* [1985] AC 191 at p 201:
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> > ... I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

(b) commercially sensible construction. In *MBF Insurans Sdn Bhd v Lembaga Penyatuan dan Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639, the Court of Appeal held as follows:

> [10] In arriving at my conclusion I have adopted the approach commended to me by the leading cases on the subject of contractual interpretation. First, that the yardstick to be applied is 'the reasonable expectations of sensible businessmen'. ... As Bhagwati, J said in *Union of India v M/s DN Revri & Co* AIR [1976] SC 2257:
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> > It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other documents. The meaning of such contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.
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> [11] A similar approach as that suggested by Bhagwati J was adopted in *Mannai Investment Co. Ltd v. Eagle Star Life Assurance Co. Ltd* [1997] AC 749, where Lord Steyn said:
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> > In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a *commercially sensible construction*. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

(c) contract not intended to produce an absurd result and sensible commercial results. In *Lee Chin Huat & Anor v Choo Keng Hee & Anor* [2013] 3 MLJ 94, the Court of Appeal held as follows:

> [10] In interpreting the undertaking, there was a requirement to interpret the undertaking in such a manner that would lead to a reasonable rather than an absurd result (see *ICI Paints (Canada) Inc v JM Breton Plastering (1984) Co* [1992] 116 NSR (2d) 385). Court is entitled to consider the logical consequences of each. When one interpretation would lead to an absurdity and the other would not, the courts are entitled to conclude that *the contract was not intended to produce an absurd result*' (see *Brinkerhoff International Inc v Numac Energy Inc* [1996] AJ No 883). 'Contracts should be interpreted to produce a common-sense interpretation in keeping with the purpose of the contract and the intention of the parties' (see *Kubota Canada Ltd v Merchant Private Ltd* [1997] OJ No 2028). 'An interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a *sensible commercial result*' (see *Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co* (1980) 112 DLR (3d) 49 at p 58).

[12] The fact that the defendant stands to receive RM930,000 if the squatters are cleared within the one-year period inherently expects a consideration from the defendant, that is to use their efforts to clear the squatters or cause the squatters to be cleared from the land. This is a sensible commercial interpretation. It would be absurd that the defendant is assured of receiving the RM930,000 with no consideration expected of them, notwithstanding the condition precedent.

ESTOPPEL IN INTERPRETATION

[13] The plaintiff in addition submits that subsequent actions/representations may estop parties from taking a view different from what had been understood to be the case. In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324; [2001] 1 CLJ 779, the Court of Appeal held as follows:

> But, is the subsequent conduct of a party admissible to interpret a contract? That question must, I think, receive a negative response. Were it otherwise, a contract would mean something today and something else tomorrow. The point has been settled by high authority ...
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> ... It will be noticed that Lord Wilberforce left the door slightly ajar by reserving *estoppel as an exception to the rule as to subseauent conduct. This has enabled us to look at subsequent conduct. not to interpret an agreement but to prevent parties from asserting that an agreement had a different meaning from the meaning that they had proceeded upon,* albeit mistakenly. In such circumstances, neither side will be permitted to say that the document meant something else on its true construction.

[14] To this end, the defendants' own solicitor's letter dated 26 July 2019 (OCS11) expressly stated that:

> We act for Mr Chan Kok Leong and Madam Leng Mei Kuan in the issue of the squatter clearance ... We have been instructed to commence legal proceedings to secure vacant possession.

which is consistent with the plaintiff's interpretation.

[15] Further, the defendants have also never disputed any of the plaintiff's letter confirming their obligation and have implicitly assented to the same: 19 February 2019 (OCS4), 07 May 2019 (OCS5), 16 July 2019 (OCS6), 16 July 2019 (OCS7).

NO NEED FOR EXTRINSIC EVIDENCE OF A TRIAL

[16] The only material fact in this dispute is whether or not the condition precedent was fulfilled. As this is not in dispute 'the condition precedent indeed was not fulfilled' the balance sum should be refunded by the stakeholders to the plaintiff. There is no necessity for a trial to determine this dispute which turns purely on the interpretation of cl 7.4.2.

THE DEFENDANTS' VIEW

[17] Conversely, the defendants' interpretation of the pertinent segment of cl 7.4.2 is as follows: The one-year time frame of the condition precedent should be disregarded. Instead, the said balance sum should be released to the defendant upon the eviction of the last of the squatter (without a time limit). Therefore, the balance sum should be refunded by the stakeholders to the plaintiff.

RATIONALE

[18] The defendant's rationale for the one-year time frame to be disregarded is this:

(a) the plaintiff, as the new owner of the company, have full control over the land and are the ones with the *locus standi* to evict the tenants;

(b) the plaintiff has taken steps to remove the squatters; and

(c) the plaintiff cannot benefit from their own tardiness for breaching the one-year time frame at the defendant's expense.

NEED FOR EXTRINSIC EVIDENCE OF A TRIAL

[19] The defendant submits that in order to show that *the plaintiff have taken steps to remove the squatters,* extrinsic evidence in a trial is required, hence, the originating summons ought to be converted to a writ action.

COURT'S FINDING — WRIT ACTION?

[20] On the issue whether a trial was necessary to determine the dispute, I find that there is no necessity. As the disputed issue is purely on the interpretation of cl 7.4.2, evidence may not be given to show its meaning anyway, even if it were ambiguous as alleged by the defendant.

[21] Section 93 of the Evidence Act 1950 provides as follows:

93 Exclusion of Evidence to Explain or Amend Ambiguous Documents

When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

ILLUSTRATIONS

(a) A agrees in writing to sell a horse to B for RM500 or RM600. Evidence cannot be given to show which price was to be given.

(b) A document contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

[22] Therefore, even with a trial, the court would still have to interpret the said clause by applying basic rules of interpretation without influence from extrinsic evidence.

COURT'S FINDING — INTERPRETATION

[23] On the interpretation of the contract, I agree that the court should apply a commercially sensible interpretation of cl 7.4.2. Applying this rule of interpretation, this in my finding.

CORRECT INTERPRETATION

[24] The overarching obligation to clear or cause the land to be cleared of squatters within the one-year time frame still rests with the defendants. The fact that the plaintiffs and the plaintiff's solicitors have a role or undertaken some part of this exercise does not absolve the defendant from this overarching responsibility. In return, they stand to receive a handsome reward of the balance sum of RM930,000. If the condition precedent is not met, the purpose for which the balance sum was held by the stakeholders has ended and must be refunded to the plaintiff.

[25] This interpretation is also consistent with another basic rule of interpretation: that is words are there for a reason/purpose. It is therefore right to interpret it in the manner that the one-year time frame is material and not disregarded.

INCORRECT INTERPRETATION

[26] On the other hand, the interpretation proffered by the defendant runs afoul of the abovementioned rules of interpretation. *First,* it would be absurd if the defendant could simply disregard their obligation, just because the plaintiff has participated to hasten the clearance of the land which is in accordance with the said clause anyway, and expect to be similarly rewarded. *Second,* it would mean that the one-year time frame is to be totally disregarded.

[27] The defendant's reasoning for disregarding the one-year time frame is also questionable. The defendants are not disabled from fulfilling their overarching responsibility to clear the land. They have implicitly been authorized to do so under cl 7.4.2 and stand to receive a considerable sum for their efforts, provided that they are able to do so within the one-year time frame.

ESTOPPEL

[28] On the additional point of estoppel: The defendants have at the material time never objected to (indicating their assent to) the plaintiff's letters affirming the defendants' obligation. They have also by their own letter admitted to their obligation (OCS11). They are estopped from taking a contrary view at this late stage.

DECISION

[29] For the above reasons, I dismissed the notice of application to covert the originating summons to a writ action and proceeded to decide on the originating summons in favour of the plaintiff and made the following declaratory orders:

(a) it is declared that the defendants have no claim over the balance sum of RM930,000 held by Messrs Cheong Wai Meng & Van Buerle as stakeholders; and

(b) it is declared that the balance sum of RM930,000 held by Messrs Cheong Wai Meng & Van Buerle of No 49, Lebuh Gereja, 10200 Pulau Pinang, as stakeholders pursuant to cl 7.4.2 of the share sale agreement dated 11 July 2018, is due and may be refunded to the plaintiff.

Defendant's notice of application dismissed.

Reported by Mohd Kamarul Anwar